United States Court of Appeals

for the Second Circuit

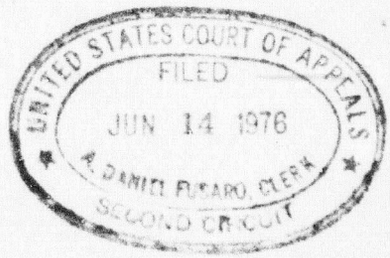
BRIEF FOR APPELLEE

76-5018

To be argued by
JEFFREY A. BARIST

United States Court of Appeals

For the Second Circuit



In Re

PROVINCIAL REFINING COMPANY LIMITED

and

NEWFOUNDLAND REFINING COMPANY LIMITED,

Bankrupts.

THE CLARKSON COMPANY LIMITED, as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited,

Plaintiff-Appellee,

against

JOHN M. SHAHEEN, ROY M. FURMARK, ALBIN W. SMITH, PHILIP GANDERT, PETER L. CARAS, PAUL W. RISHELL, WILLIAM J. SHERIDAN, and JOHN DOE,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE

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Docket No. 76-5018

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Plaintiff-Appellee,

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JOHN M. SHAHEEN, ROY M. FURMARK, ALBIN W. SMITH, PHILIP GANDERT, PETER L. CARAS, PAUL W. RISHELL, WILLIAM J. SHERIDAN and JOHN DOE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

ISSUE PRESENTED

Did the court below abuse its discretion in issuing a preliminary injunction requiring the defendants, former officers and directors of Provincial Refining Company ("PRC") and Newfoundland Refining Company Limited ("NRC"), to turn over the books and records of PRC and NRC to plaintiff, The Clarkson Company Limited ("Clarkson"), appointed as Trustee in Bankruptcy of PRC and NRC, and restraining the defendants from secreting or disbursing any other property belonging to PRC and NRC when:

(a) it was uncontroverted that Clarkson was appointed Trustee in Bankruptcy by the Supreme Court of the Province of Newfoundland;

(b) defendants conceded they had custody and control of the books and records of PRC and NRC and made no claim that such custody was under color of right;

(c) the court below found that to allow defendants to continue to control the books and records would create "an enormous risk of irreparable injury to the trustee...and that they may well be destroyed or vanish and be unavailable at the time the trustee has a lawful need for them." (Oral opinion of Judge Owen, A. 420).

STATEMENT OF THE CASE

This is an appeal from the issuance of a preliminary injunction directing former officers and directors of two bankrupt corporations to turn over to the court appointed trustee in bankruptcy the books and records of the corporations and further restraining defendants from disbursing or secreting any property of the bankrupts. The trustee in bankruptcy of PRC and NRC here sought ustody of property of the bankrupts located in New York and particularly of the books and records of those companies. Defendants, former officers of the bankrupts, conceded their control of the books and records of the bankrupts and offered no claim that this control continued under color of right. The trustee established that it needed the books and records not only for ordinary problems of the administration of the estates, but also to allow it to investigate possible claims of tens of millions of dollars arising from payments made by the bankrupt corporations to corporations controlled by defendants. The district court (Judge Owen) held that the trustee had an "absolutely lawful right" to all property of the bankrupts and that "there is enormous risk of irreparable injury to the trustee" and that the books "may well be destroyed" (A. 420) and granted the preliminary injunction here on appeal.

STATEMENT OF THE FACTS

PRC and NRC are corporations organized and existing under the laws of the Province of Newfoundland, Canada. Their business consisted of the ownership and operation of a refinery for petroleum products in the Province of Newfoundland. (A. 4, 16)

On February 13, 1976, Atlantic Trading (Delaware) Corporation ("Atlantic") filed with the Supreme Court of the Province of Newfoundland, Canada, pursuant to the Bankruptcy Act (Canada), Can. Rev. Stat., Chap. B-3 (1970) (the "Canadian Bankruptcy Act") Petitions for Receiving Orders alleging that PRC and NRC were insolvent and had ceased to meet their liabilities generally as they became due, and sought the appointment of an interim receiver. (A. 12-13, 15) Clarkson was appointed Interim Receiver by the Newfoundland court. (A. 15)

On March 12, 1976, the Chief Justice of the Supreme Court for the Province of Newfoundland, after a week long adversary hearing in which PRC and NRC were represented by counsel, adjudicated PRC and NRC bankrupt. (A. 12-13, 251) PRC and NRC were found to be indebted in the amount of hundreds of millions of dollars, and hopelessly insolvent;

included among their creditors are the governments of the Province of Newfoundland and the United Kingdom (A. 12-13, 251) The Newfoundland court appointed Clarkson trustee in bankruptcy of both corporations. (A. 12-13, 22-31).*

The books and records of PRC and NRC were in the custody of defendants in New York City. (A. 5-6, 411) During the period between its appointment as Interim Receiver (February 13, 1976) and its appointment as trustee, defendants gave Clarkson limited access to the books and records of PRC and NRC. After Clarkson was appointed trustee, defendants refused Clarkson any further access to the books and records of the bankrupts. (A. 15-16, 251)

Canadian law requires Clarkson, as trustee, to take possession of all the books and records of PRC and NRC. (See pp. 13 to 15, infra.) In the ordinary bankruptcy, rational administration of the estate requires no less. In this case, the trustee further needed the books and records so as to

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* Clarkson is licensed by the Bankruptcy Superintendent of Canada to carry on a practice as a trustee in bankruptcy in all provinces of Canada except Quebec (where any such trustee must be an individual) and British Columbia and believes that it conducts the largest such practice in Canada. Clarkson and its predecessors have conducted a bankruptcy practice for more than 100 years. (A. 14, 251)

investigate claims of PRC and NRC against the defendants, the former officers and directors of those companies.

PRC and NRC are part of a complex web of companies ultimately controlled by defendant, John M. Shaheen. The preliminary examination of the books of PRC and NRC made by Clarkson had established that millions of dollars were sent by PRC and NRC to Shaheen controlled companies in unexplained transactions at times when PRC and NRC were, if not yet insolvent, incurring losses in the tens of millions of dollars. It was and is essential that these transactions be examined with considerable care (A. 16-17, 250-251)

The petitions for bankruptcy filed in the Supreme Court of Newfoundland further had evoked continual opposition and harassment from those who had previously controlled the bankrupt corporations. At the time of Clarkson's application to the District Court for relief, the Shaheen group had filed at least four actions attempting to upset the Canadian bankruptcy.* The trustee properly regarded the refusal of the

* These are as follows: (i) Newfoundland Refining Company Limited, et ano. v. Ataka America Inc. (76 Civ. 941 (S.D.N.Y.)). After hearings before Judge Motley the action was voluntarily dismissed by plaintiff before any decision was rendered; (ii) Provincial Refining Company, et ano. v. Kleinwort Benson Ltd., et ano. (Supreme Court, New York County, Index No. 93740/76); (iii) Provincial Refining Company Limited, et ano. v. Province of Newfoundland, et ano. (Supreme Court, New York County, Index No. 03960/76; (iv) SNR Holding Company, Inc., as sole stockholder of Newfoundland Refining Company Limited and Provincial Refining Company Limited v. Ataka America Inc., et al. (Supreme Court, New York County, Index No. 03959/76).

defendants to give it even access to the books and records of PRC and NRC as but another part of their continued attempt to avoid the proper administration of the estates.

PROCEEDINGS HERETOFORE HAD HEREIN

The action was commenced by the filing of a complaint on March 23, 1976. (A. 3-7) On that same day Judge Richard Owen issued a temporary restraining order which ordered that defendants:

> "(1) Are restrained from transferring any of the books and records of NRC and PRC from their present location and from destroying, altering or secreting any of the books and records of NRC and PRC;
>
> (2) Are directed to give Clarkson immediate and continuing access to the books and records of NRC and PRC with the right to inventory, examine and copy; and
>
> (3) Are restrained from disbursing, removing or secreting any other property of NRC or PRC in their custody or control." (A. 8-10)

On March 24, 1976 defendants' attorney herein secured from Justice Andrew R. Tyler, Supreme Court of the State of New York, an ex parte temporary restraining order as follows:

> "Ordered, that pending the hearing and determination of this motion, said defendant [Clarkson], its agents, attorneys and employees, be and hereby are, enjoined and restrained from taking any future action in the State of New York or interfering in any way with the business or assets of NRC or PRC or their offices, located in the State of New York...." (A. 253)

This order was secured in part on defendants' attorney's representation that the order of the state court would not in any way conflict with the order of the federal court. (A. 253) This order was used to deny Clarkson the access to the books and records granted by Judge Owen's order of March 23. (A. 253)

On March 25, 1976, Justice Tyler was informed that the order signed by him on March 24 was being read by defendants to preclude the right of access to the books and records of NRC and PRC granted by the order of Judge Owen, and thereupon modified the state court temporary restraining order as follows:

> "Ordered, that the temporary restraining order entered by this Court on the 24th day of March, 1976 hereby is modified to the extent that Clarkson is not restrained from proceeding in the U.S. District Court action or taking any action pursuant to any order issued by that court." (A. pp. 253-254)

On March 26, 1976 defendants purported to appeal from the temporary restraining order granted by Judge Owen and moved this Court to stay the trial court's temporary restraining order.* This Court adjourned defendants' motion to a date after the scheduled hearing on the application for a preliminary injunction.

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* No motion to stay the proceedings had been made by the defendants in the District Court.

On April 1, 1976 argument was held before Judge Owen on Clarkson's application for a preliminary injunction. Judge Owen held:

> "I am making my temporary restraining order the preliminary injunction and I am directing that Clarkson be given forthwith the books and records of NRC and PRC in the custody of the defendants in this case or their agents, servants, employees or attorneys or any other persons in active participation with them...." (A. 420-421, see also 428)

Whereas the restraining order had left the books and records under the control of defendants, the preliminary injunction required defendants to deliver the books and records to Clarkson.*

Defendants thereupon filed a "Notice of Appeal" to this Court "from the preliminary injunction order of Hon. Richard Owen dated April 1, 1976, upon the ground that the identical issues involved in this action are presently before

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* No more formal order has been entered. Clarkson's application had also sought a preliminary injunction:

> "4. Requiring defendants and their agents, servants, employees and attorneys, and other persons in active participation with them who receive actual notice of the Order, to deliver into the possession and control of Clarkson all property of NRC and PRC;". (A. 9)

Judge Owen denied this request as the record was not sufficient as to what other property, besides books and records, was involved. (A. 421-422, 426-428) The court below did preliminarily enjoin defendants from disbursing or secreting any other property of the bankrupts. (A. 428)

the Supreme Court of the State of New York, County of New York, in an action in which the plaintiff herein has sought to be substituted as plaintiff...." (A. 389-390), and applied to this Court for a stay of the District Court's preliminary injunction, and of all proceedings below.

On April 6, 1976 argument was held before this Court on defendants' application for a stay of the order of preliminary injunction and of all proceedings below pending the determination of an appeal from that order. On that same day this Court issued an order denying defendants' application. Thereafter defendants filed an "Alternative Application For Rehearing or Stay" requesting that this Court grant a rehearing or in the alternative grant a stay pending application for a stay from the Supreme Court to permit the filing of an application for a writ of certiorari. This Court denied defendants' application for a rehearing or a stay on April 19, 1976.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION REQUIRING DEFENDANTS TO DELIVER TO CLARKSON ALL BOOKS AND RECORDS OF PRC AND NRC AND RESTRAINING DEFENDANTS FROM DISBURSING ANY PROPERTY OF THE BANKRUPTS

An application for a preliminary injunction is addressed to the judicial discretion of the trial court, and an abuse of that discretion must be shown in order to obtain a reversal of the trial court's decision.* Hagopian v. Knowlton, 470 F.2d 201, 207 (2d Cir. 1972); Safeway Stores Inc. v. Safeway Properties Inc., 307 F.2d 495, 500 (2d Cir. 1962). In reviewing the trial court's granting or denial of a preliminary injunction, this Court has looked to see whether the moving party had made "a clear showing of probable success and possible irreparable

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* Defendants also purport to appeal the temporary restraining order issued by the court below on March 23, 1976. First, the granting of the temporary restraining order is mooted by the preliminary injunction issued by the court below. Second, the granting or denial of a temporary restraining order is neither a final decision of the District Court nor is it among the limited number of interlocutory orders which are subject to appeal. Morning Telegraph v. Powers, 450 F.2d 97, 99 (2d Cir. 1971), cert. denied, 405 U.S. 954 (1972).

injury." Dino de Laurentiis Cinematografica S.p.A. v. D-150 Inc., 366 F.2d 373, 375 (2d Cir. 1966) quoting from Societe Comptoir de l'Indus. v. Alexander's Dept. Store, Inc., 299 F.2d 33, 35 (2d Cir. 1962). In cases in which the balance of hardships tip decidedly in favor of the moving party, this Court has held that the burden of showing probable success with reasonable certainty is less and the moving party need only raise issues presenting a "fair ground for litigation." Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953), quoted with approval in Hagopian v. Knowlton, supra, 470 F.2d at 207. The record herein compelled the granting of a preliminary injunction under either of these tests.

A. The Court Below Correctly Found That Clarkson Had Made A Clear Showing Of Probable Success

With respect to the merits of the case, the court below held:

> "I make a finding that Clarkson is the Trustee in Newfoundland and there is entitled to the books and records, were they located in Newfoundland.
>
> "Under comity, it is conceded I have the power to turn them over to a validly appointed trustee, and as far as I am concerned, this is not the court to collaterally attack that appointment. If there is to be such an attack, it is in Newfoundland[,] not before this Court.

"These books are concededly in the control and the possession of the defendants here." (A. 418-419)

Clarkson established that it was the trustee in bankruptcy for PRC and NRC, appointed as such by the Supreme Court of the Province of Newfoundland. (A. 12-13, 22-31)

The Canadian Bankruptcy Act effects a transfer of title to property wherever situated from the bankrupt to the trustee in bankruptcy immediately upon the appointment of such a trustee and imposes certain duties and obligations on the trustee and upon the bankrupt itself. (A. 258-261)

The Canadian Bankruptcy Act provides:

"On a receiving order being made,...a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act, and subject to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order...." Canadian Bankruptcy Act §50(5).*

Property is defined as:

"'Property' includes money, goods, things in action, land, and every description of property,

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* For a similar provision in the Bankruptcy Act of the United States, see 11 U.S.C. §110(a) which provides that the trustee shall be "vested by operation of law with the title of the bankrupt" in "property wherever located."

> whether real or personal, movable or immovable, legal or equitable, and whether situated in Canada or elsewhere and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property;" (Emphasis added.) Canadian Bankruptcy Act §2.

These provisions of the Canadian Bankruptcy Act transferred title to all the property of PRC and NRC, including property located in the State of New York, from the bankrupts to Clarkson, as trustee in bankruptcy.

Clarkson was empowered by the Canadian Bankruptcy Act to pursue the property of the bankrupts, PRC and NRC, wherever situated, in order to reduce it to possession. The Canadian Bankruptcy Act provides:

> "For the purpose of obtaining possession of and realizing upon the property of the bankrupt a trustee has power to act as such anywhere." Canadian Bankruptcy Law §12(6).*

It is elementary that a trustee in bankruptcy must immediately commence an examination of the books and records of the bankrupt in order to ascertain what property belongs to the bankrupt, where it is situated and what debts the bankrupt

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* The Bankruptcy Act of the United States specifically directs the bankrupt (or its officers if it is a corporation) to execute and deliver to the trustee transfers of all his property in foreign countries, 11 U.S.C. §25(a)(5), 11 U.S.C. §25(b).

has. It is essential that the trustee in bankruptcy have access to all books, accounts and records wherever situated in order to properly fulfill its function. Accordingly, the trustee is given the power to enter any premises where such books, accounts and records are kept. The Canadian Bankruptcy Act expressly provides that:

> "The trustee shall, as soon as may be, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter upon any premises on which the books, records, documents or property of the bankrupt may be, notwithstanding that they may be in the possession of a sheriff, a secured creditor, or other claimant thereto." Canadian Bankruptcy Act §12(2).

No person is entitled to frustrate the equitable administration of a bankrupt estate by withholding possession of any books, accounts or records belonging to the bankrupt. The Canadian Bankruptcy Act specifically provides that:

> "No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents relating to the accounts or to any trade dealings of the bankrupt or to set up any lien thereon." Canadian Bankruptcy Act §12(4).

While Clarkson, as trustee, was vested with title to the books and records by operation of law, the defendants had no claim and, indeed made no claim, that they were entitled to possession of the books and records. The trial

court had before it the application of the rightful owner of property to require defendants with no right to the property to deliver the property to the rightful owner.

B. The Court Below Correctly Found That The Balance Of Hardships Tipped Decidedly In Favor Of Clarkson And That Denial Of A Preliminary Injunction Would Work Irreparable Injury To The Trustee

The court below held:

"I find that given the history of steps before me starting with March 23rd, when I signed this order based upon a concern of the moving party that these documents might be destroyed or disappear, that there is certainly some substantial evidence that that is a risk, finding as I do that on the 24th an order was obtained from a Supreme Court judge in New York County which was used to block the examination on that day until it was vacated, and counsel for defendants coming into this court on the evening of the 25th and stating to me that when my order had been presented he had declined to honor it and had said that he had thrown the order presenter out and demanding that I vacate the order forthwith because I had no power or authority to enter it.

"These are, in my judgment, strong evidence of an effort to block this inquiry, to block access to these books to which, as I say, I find the trustee has an absolutely lawful right. And I find that there is an enormous risk of irreparable injury to the trustee here were they not turned over, and that they may well be destroyed or vanish and be unavailable at the time the trustee has a lawful need for them.

"***[I]t would similarly appear there is little hardship if these books were in fact turned over to the trustee...." (Emphasis added) (A. 419-420)

The danger of the books and records being destroyed was clear. The trustee here needed the books and records to, inter alia, investigate potential claims against the defendants involving the transfer of tens of millions of dollars from PRC and NRC to other Shaheen companies. And while defendants had given Clarkson limited access to the books and records for a brief period of time when Clarkson was acting as Interim Receiver, defendants had refused Clarkson access when Clarkson was appointed trustee. The court below further correctly considered defendants' attempt to evade the order of the court. Judge Owen expressed on the record his recollection of the ex parte statement of defendants' counsel to the effect that he had "declined to honor" Judge Owen's order. (A. 420) While defendants now assert Judge Owen was in error in his recollection (Appellants' Br., p. 11), there is no dispute that defendants did attempt to use a restraining order secured from the New York State Supreme Court to block compliance with Judge Owen's order.

In terms of balancing of hardships, the equities further weighed on behalf of the trustee. The trustee needs the books and records of the bankrupt companies so as to commence its examination of the affairs of the bankrupt and the administration of the estate. The only hardship asserted

by the defendants herein is their allegation that they need the books and records in order to pursue various lawsuits brought by other Shaheen companies.* Since the defendants were given the right under the terms of the preliminary injunction to examine and copy the books and records, this alleged hardship has been obviated.

II

THE COURT BELOW CORRECTLY HELD THAT COMITY REQUIRED IT TO RECOGNIZE THE RIGHT OF THE TRUSTEE TO THE PROPERTY OF THE BANKRUPTS

A. The Rights Of A Foreign Trustee Are Recognized

The doctrine of comity was defined by the Supreme Court in Hilton v. Guyot, 159 U.S. 113, 163-4 (1895):

> "'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

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* Insofar as these other lawsuits involve any cause of action belonging to PRC or NRC, such cause of action belongs to the trustee.

The essence of the rule of comity is that a state "not discriminate between its own citizens and those of a foreign state." Oseas v. Sutton, 83 N.Y.S.2d 515, 519 (Sup. Ct. Kings Co.), aff'd, 274 App. Div. 99, 85 N.Y.S.2d 336 (2d Dep't 1948), quoting Mabon v. Ongley Electric Co., 156 N.Y. 196, 201, 50 N.E. 805, 806 (1898).

Relying upon principles of comity, the courts of the State of New York have repeatedly acknowledged the principle that title to the property of the bankrupt which has devolved upon trustees or receivers by virtue of their appointment as trustees or receivers in foreign bankruptcy or insolvency proceedings will be recognized and enforced in New York. See, e.g., In re Cobham's Will, 81 N.Y.S.2d 356 (Sup. Ct., N.Y.Co. 1948) (English trustee); In re Waite, 99 N.Y. 433, 2 N.E. 440 (1885) (English trustee); In re Stoddard, 242 N.Y. 148, 151 N.E. 159 (1926) (Norwegian receiver); Matter of People (City Equitable Insurance Co.), 238 N.Y. 147, 144 N.E. 484 (1924) (English liquidator).

The Supreme Court articulated the rule prevailing in New York in the following language:

> "The rule in that State is, that by the comity of nations, the statutory title of foreign assignees in bankruptcy is recognized and enforced when it can be done without injustice to the citizens of the

> State, and without prejudice to creditors pursuant to their remedies under the New York statutes, provided also that such title is not in conflict with the laws or public policy of the State, and that the foreign court had jurisdiction of the bankrupt." Cole v. Cunningham, 133 U.S. 107, 122-23 (1890) (citation omitted).

Here, as in In re Waite, supra:

> "We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears no injustice whatever will be done to any of our citizens, or to anyone else, by allowing the transfer to have full effect here. Indeed justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditor [sic] of the bankrupts. 99 N.Y. at 439, 2 N.E. at 443.

Justice required that Clarkson be given the books and records of the bankrupt companies which it needed to enable it to administer the estate for the benefit of the creditors. No rights of local creditors were adversely affected.

Canada, of course, is a sister common-law jurisdiction and its laws and procedures are akin to our own. (See analogy between Canadian Bankruptcy Act and United States Bankruptcy Act, at pp. 13-15, supra.) Trustees in bankruptcy appointed by its courts are recognized in this country, Waxman v. Kealoha, 296 F. Supp. 1190 (D. Hawaii 1969), and the judgments of its courts are given effect by the courts of New

York. International Firearms Co. Ltd. v. Kingston Trust Co., 6 N.Y.2d 406, 189 N.Y.S.2d 911, 160 N.E.2d 656 (1959).* The remedy of injunctive relief on behalf of a foreign trustee to gain possession of property is appropriate. See Union Guardian Trust Co. v. Broadway National Bank & Trust Co., 138 M. 16, 245 N.Y.S. 2 (Sup. Ct., N.Y.Co. 1930) (Michigan receiver suing for injunction compelling officer of bankrupt to turn over sums of money he had withdrawn); see also Rinehart v. Hasco Bldg. Co., 153 App. Div. 153, 158, 138 N.Y.S. 258, 261 (1st Dep't 1912), aff'd, 214 N.Y. 635, 108 N.E. 1106 (1915) (in which the court stated that a receiver could sue to enjoin wrongful interference with his possession of property of the bankrupt.) The remedy of injunction was here the most appropriate since it was necessary that the defendants not only be ordered to turn over possession of all of PRC's and NRC's books and records located in New York to Clarkson, but also be enjoined from removing, destroying, secreting or tampering with any property including such books and records.

* The Canadian courts will give a trustee appointed in the United States the relief requested in this action. In William v. Rice, 3 D.L.R. 225 (1926), a trustee of the bankrupt in the United States was allowed by the Canadian court to recover personal property of the bankrupt fraudulently transferred to a resident of Manitoba.

B. The Court Below Correctly Held That No Exception To The Doctrine Of Comity Here Exists

While "comity" has within it the elements of discretion, that discretion is limited. American courts cannot arbitrarily refuse to enforce a foreign right. As was stated by the New York Court of Appeals in Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918):

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal." Quoted in Waxman v. Kealoha, 296 F.Supp. 1190, 1193 (D. Hawaii 1969); cited with approval in Parsons & Whittemore Overseas Co. Inc. v. Societe G. De L.Du Papier, 508 F.2d 969, 974 (2d Cir. 1974)

A foreign court's decision may not be denied comity or subjected to collateral attack because the losing party here asserts -- without proof -- that the judgment is "tainted with fraud." (Appellants' Br., p. 21). The "fraud" which must be shown in order to permit a collateral attack on a foreign judgment is extrinsic fraud, e.g., fraud which results in the obtaining of jurisdiction over the defendant or fraud which deprives an adversary of the opportunity to make a full and

fair defense. See, e.g., Tamimi v. Tamimi, 38 App. Div.2d 197, 328 N.Y.S.2d 477 (2d Dep't 1972). Allegations of intrinsic fraud, e.g., fraud attendant upon the cause of action itself, or fraud which consists of the giving of false evidence or any other form of fraud against which the injured party might have protected himself at trial, which is the type of fraud here asserted by the defendants, cannot serve as the basis for a collateral attack on a foreign judgment. United States v. Throckmorton, 98 U.S. 61 (1878). The defendants herein do not dispute the fact that a week long adversary hearing was held in Canada in which PRC and NRC, through counsel, contested the bankruptcy adjudication and raised all of the questions as to the propriety of the bankruptcy adjudication being raised by the defendants herein. (A. 13, 251; 108)

In Oldham v. McRoberts, 21 App. Div.2d 231, 249 N.Y.S.2d 780 (4th Dep't 1964), aff'd, 15 N.Y.2d 891, 258 N.Y.S.2d 424, 206 N.E.2d 358 (1965), plaintiffs attempted to attack collaterally a prior adjudication of a Pennsylvania court on the ground that the prior determination was the result of a conspiracy by which the defendants had fraudulently induced the court to rule in their favor. The plaintiff made extensive allegations of fraudulent conduct in which the defendants took part prior to the trial of the

first action. As to those allegations, the court held that since the propriety of those actions had been put in issue and fully litigated in the first action, and since plaintiff had not been deprived of an opportunity to uncover its grievance and expose it to the court, the first adjudication was a complete bar to the new action. Plaintiff also introduced new allegations of fraud not presented to the court in the first action pertaining to fraudulent documents and testimony known to be false which had been put before the court in the first action by the defendants. The court held that "this is not the type of fraud which will justify a collateral attack upon a judgment." Oldham v. McRoberts, supra, 21 App. Div.2d at 235, 249 N.Y.S.2d at 784 (citing Crouse v. McVickar, 207 N.Y. 213, 100 N.E. 697 (1912)).

Certainly the fact that the Shaheen group has named the trustee in a lawsuit is neither reason to deny the trustee power to act on behalf of the estates the Newfoundland court appointed it to represent nor evidence of fraud. The suit against Clarkson must be recognized for what it is, the easiest sort of procedural trick. Were the Shaheen group's position to be accepted, the right of any trustee to control the bankrupt estate could be defeated by the simple expedient of adding the trustee as a defendant

in a multi-party caption, and then asserting that, of course, the trustee cannot take control of property of the estate. Such an obvious ploy, such as is here attempted, should be readily seen through and readily discarded. The state court action neither establishes nor even provides proof of "fraud". Indeed, in reading the voluminous papers submitted by plaintiffs there appears no allegation that Clarkson did anything other than act as Receiver and then Trustee pursuant to orders of the Supreme Court of the Province of Newfoundland.

Nor may a foreign judgment be collaterally attacked "upon the mere assertion of the party that the judgment was erroneous in the law or in fact." Hilton v. Guyot, 159 U.S. 113, 202 (1895). While defendants couch their argument in terms of violation of New York public policy as pronounced in New York Judiciary Law §489 and cases dealing with forum selection clauses (Appellants' Br., pp. 23-37) their contention really boils down to a complaint that the Canadian court did not properly apply New York law. Defendants do not dispute that these matters were raised before the Canadian court and adjudicated there. (A. 13, 251, 108)

There is no allegation here of a violation of public policy which is "repugnant to fundamental notions of what is decent and just in the state where enforcement is sought",

Restatement 2d, Conflicts of Laws §117, Comment c, cited with approval in Parsons & Whittemore Overseas Co. Inc. v. Societe G. De L. Du Papier, 508 F.2d 969, 974 (2d Cir. 1974), such as occurred in the cases cited by defendants in which a foreign judgment was collaterally attacked on the basis of public policy. In all four of the cases cited by the defendants in which such a collateral attack was allowed the matter in issue was an offense against the right to due process. Vladikavkazsky Ry Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Koninklijke Lederfabriek "O" v. Chase Nat. Bank, 177 M. 186, 30 N.Y.S.2d 518 (Sup. Ct. N.Y.Co.), aff'd, 263 App. Div. 815, 32 N.Y.S.2d 131 (1st Dep't 1941); In re Davis' Will, 31 M.2d 270, 219 N.Y.S.2d 533 (Surr. Ct. Westchester Co. 1961), aff'd, 16 App. Div.2d 683, 277 N.Y.S.2d 894 (2d Dep't 1962); Falcon Manufacturing (Scarborough) Ltd. v. Ames, 53 M.2d 332, 278 N.Y.S.2d 684 (Civ. Ct. N.Y.Co. 1967).* No violation of due process or of any other fundamental concept of justice has been alleged here. PRC and NRC are Canadian corporations subject to the jurisdiction of the Canadian courts and participated in a week long adversary hearing in which they raised all of their defenses prior to the bankruptcy adjudication.

* The remainder of the cases cited by the defendants merely contain dicta stating that a foreign judgment may be collaterally attacked if it violates public policy.

C. The Court Below Properly Declined Defendants' Request To Abstain From Determining The Question Of Comity

In urging that the district court should have abstained from exercising its jurisdiction defendants ignore the admonition of the Supreme Court that:

> "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in exceptional circumstances where the order to the parties to repair to the State Court would clearly serve an important countervailing interest." Allegheny County v. Mashuda Co., 360 U.S. 185, 188-9 (1958).

Abstention is not justified where the decision

> "... would not entail the possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law." Allegheny County v. Mashuda Co., supra, 360 U.S. at 187.

A federal court may not refuse to exercise its jurisdiction to suit unsupported allegations of "convenience." Meredith v. The City of Winter Haven, 320 U.S. 228, 234 (1943).

No constitutional question or other delicate

problem of federalism is here present. There exists no reason why the court below should not have decided whether to accord comity to the determination of the Canadian court.*

Here, moreover, the district court's correct application of New York law on the question of comity has been confirmed by the state court. By memorandum decision dated April 9, 1976, Justice Tyler recognized Clarkson as trustee under the principles of comity and granted Clarkson's motion to be substituted as the party plaintiff in the action entitled SNR Holding Company Inc. as sole stockholder of Newfoundland Refining Company, Inc. and Provincial Refining Company, Limited v. Ataka America Inc., et al. (Sup. Ct. N.Y.Co., Index No. 03959/76).

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* None of the cases cited by the defendants support their assertion that the court below should have abstained. Republic of Iraq v. First Nat. Bank of Chicago, 350 F.2d 645 (7th Cir. 1965); Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971), cert. denied, 405 U.S. 1017 (1972); and Svenska Handelsbanken v. Carlson, 258 F.Supp. 448 (D.C. Mass. 1966) (Appellants' Br., p. 18) are federal court cases in which the federal court decided the question of comity in accordance with state law. Clark v. Willard, 292 U.S. 112 (1934) and 294 U.S. 211 (1935) and Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908) are concerned solely with the question of whether one state can favor local levying creditors over a liquidator or trustee appointed by another state insofar as claims to local property were concerned. The Supreme Court found that the question was a matter for determination by the individual state as a public policy question and that a state decision to favor local creditors would not violate due process or full faith and credit.

III

THE COURT BELOW CORRECTLY HELD THAT THE EXISTENCE OF A STATE COURT PROCEEDING INVOLVING DIFFERENT PARTIES AND DIFFERENT CAUSES OF ACTION DID NOT DIVEST THE DISTRICT COURT OF JURISDICTION

Defendants assert that Clarkson's request for relief in the action entitled SNR Holdings Co., et al. v. Ataka America Inc., et al., commenced in the New York state court, somehow divested the district court of jurisdiction under the principle of Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456 (1939). (Appellants' Br., pp. 42-51) The court below specifically rejected defendants' contention. (A. 413-416)

The state court action was instituted by PRC, NRC and two Shaheen companies as shareholders of PRC and NRC. The complaint inter alia seeks money allegedly owing PRC and NRC due to certain alleged breaches of contract by Ataka America and allegedly unlawful set-offs by Sumitomo Bank. Named as defendants are the major creditors of PRC and NRC, as well as Clarkson. Pursuant to §1017 of the New York Civil Practice Law and Rules, the doctrine set forth in Meyer v. Fleming, 327 U.S. 161 (1946) and the analogous provisions of the Canadian law, Clarkson moved in the state court to have itself, as trustee, substituted as the party plaintiff since title to all property of the bankrupts,

including causes of action, vested in it upon its appointment as trustee.

The trustee's request before the state court "for such other and further relief as may be necessary to preserve the assets of the estate" of PRC and NRC (quoted at pp. 44 and 50 of Appellants' Brief) is mischaracterized by defendants. The relief sought by the trustee in the state court action pertained only to title to the causes of action asserted in that court insofar as they are assets of the estate which Clarkson is duty-bound to preserve. The trustee's request for relief in the state court did not extend to any assets of the bankrupt corporations other than the causes of action there asserted and thus did not in any way touch upon the relief requested by the trustee in this action.

The action before the federal court was instituted by the trustee against the former officers and directors of PRC and NRC on the ground that those individuals were wrongfully withholding books and records and other property belonging to PRC and NRC. No such prayer for relief has been made to the state court.

Defendants are thus asserting that a cause of action for breach of contract and unlawful set-offs against Ataka America, Sumitomo Bank and certain other named defendants

asserted in the state court should preclude the federal court from exercising its jurisdiction in a proceeding which pertains to a wrongful withholding of possession of property brought against the former officers and directors of PRC and NRC. There is no similarity between the two cases and no rationale for the defendants' position.

The purpose of the holding in Princess Lida, supra, was to prevent interference by the federal court with a res controlled by a state court. The action in the state court here in question was an in personam action for damages and not an in rem action to liquidate estates within the meaning of Princess Lida; it therefore did not preclude the court below from exercising its jurisdiction. No act requested or granted by the court below interfered with the state court's administration of a res.*

Moreover, even the adoption of defendants' characterization of "in rem" and "in personam" actions does not lead

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* Indeed, the only court involved in the affairs of PRC and NRC, and of the parties now before this court, which has an in rem proceeding before it is the Supreme Court of the Province of Newfoundland. That court must control the property, or the res, of PRC and NRC in order to supervise the equitable administration and distribution of the estate. It is a proceeding such as the one in Canada, which, under the holding of Princess Lida, must be before the state court in order to preclude the exercise of jurisdiction by the federal court.

to the conclusion they propound. The res in the state court, if it can be so characterized, was a cause of action, while the res in the federal court, if it can be so characterized, are the books and records. The two "res" are different and the proceedings in the court below in no way interfered with the state court's control of a res.

IV

THERE ARE NO INDISPENSABLE PARTIES LACKING TO THIS CASE

Defendants' argument to this court that PRC and NRC are indispensable party defendants whose presence would destroy diversity was never made to the court below. In fact, PRC and NRC are before the court, in the form of their trustee and as party plaintiff. This suit was commenced by Clarkson in its capacity as trustee of PRC and NRC in order to enforce title to the bankrupts' property which had vested in it. The interests of PRC and NRC in this action are properly represented by their trustee, Clarkson:

> "The holder of the legal title or right, such as a trustee...is the real party in interest in an action to enforce the title or right and the beneficiaries need not be joined." 3A Moore's Federal Practice ¶19.12 at pp. 2372-2373.

Clarkson is the sole party necessary to this action.*

V

THE COURT BELOW PROPERLY DID NOT REQUIRE A BOND UPON THE ISSUANCE OF THE PRELIMINARY INJUNCTION

Defendants here assert that the requirement of a bond by the court is a "condition precedent" to the issuance of a preliminary injunction without which any preliminary injunction issued is rendered invalid.** (Appellants' Br., pp. 52-59) No request for a bond was ever made to the district court.

Rule 65(c), F.R. Civ. P., states:

> "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper." (Emphasis added)

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* Defendants attempt to make much of what they contend would be the inconsistent obligations of the defendants and the prejudice to PRC and NRC if this court were to affirm the preliminary injunction and the Canadian court were to reverse the bankruptcy adjudication or Clarkson's appointment as trustee. It is difficult to see where the conflicting obligations or prejudice may arise since if such a reversal were ever ordered by the Canadian court, title to property would revert to PRC and NRC. Neither the defendants herein nor PRC nor NRC would have been harmed.

** Defendants make a similar contention with respect to the temporary restraining order issued by the court below on March 23, 1976, which was mooted by the preliminary injunction.

Plainly then the amount (or lack thereof) of any bond rests with the sound discretion of the trial court. E.g., International Controls Corporation v. Vesco, 490 F.2d 1334, 1356 (2d Cir. 1974), where this Court held that under Rule 65(c) the "district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined"; Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961) where this Court held that where there had been no showing of probable loss because of the restraining order "the entry of the order without requiring a bond was within the discretion of the district court".*

Defendants cite two cases as authority for their contention that a bond is a condition precedent to a preliminary injunction without which the injunction fails. In Hopkins v. Wallin, 179 F.2d 136 (3rd Cir. 1949) (Appellants' Br., p. 52), a preliminary injunction was vacated and the matter remanded on grounds other than the failure to require a bond.** Chatz v. Freeman, 204 F.2d 764 (7th Cir. 1953)

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* Accord, Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Continental Oil Company v. Frontier Refining Company, 338 F.2d 780 (10th Cir. 1964); Urbain v. Knapp Brothers Manufacturing Company, 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955).

** See the discussion of Hopkins v. Wallin by the court in Urbain v. Knapp Brothers Manufacturing Company, 217 F.2d 810 (6th Cir. 1954), cert. denied, 349 U.S. 930 (1955).

(Appellants' Br., p. 53) is a decision of the Court of Appeals for the Seventh Circuit reversing a temporary restraining order and to the extent that it holds that a bond is a prerequisite to the granting of a preliminary injunction, the Seventh Circuit has since ruled to the contrary. See, Scherr v. Volpe, 466 F.2d 1027, 1035 (7th Cir. 1972), where the Seventh Circuit approved the granting of a preliminary injunction without the posting of a bond.

Defendants made no application to the court below for the filing of a bond and put in no proof with respect to any harm that could result to them upon the issuance of the preliminary injunction. There has been no showing on the record below of any likelihood of harm to the parties enjoined.*

Even had an application for a bond been made to the court, it would have been here properly denied. Clarkson is a licensed and bonded trustee in bankruptcy answerable to the Canadian court which appointed it. The property which has been turned over is paper -- not assets capable of waste or dissipation. No reason exists for burdening the estates with the expense of a bond.

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* In Powelton Civic Home Owners Ass'n v. Department of H&U Development, 284 F.Supp. 809, 839 (E.D. Pa. 1968) an analogous situation arose; the court did not require security where defendants had neither requested any security nor offered any proof of likelihood of harm.

Defendants decry the fact that Clarkson has moved the books and records to its offices in Canada. (Appellants' Br., pp. 14, 58-59) This point was previously raised in support of defendants' application to this court for rehearing on their motion for a stay of the preliminary injunction order. As was set forth to this Court previously, the books were transferred solely in order to avoid needless expense to the estates of the bankrupts and to avoid the disruption of the orderly administration of the estates. Clarkson is a Canadian entity which has no employees in New York; the investigation of the books and records in New York would have necessitated moving a team of accountants from Canada with the concomitant expense of housing and feeding them in New York. It would also have made it impossible for the team of accountants going over the books and records to be in constant and needed communication and conference with other personnel located in Canada who were engaged in the affairs of the bankrupt Canadian corporations. The trustee further has represented to return the books to New York were any court to so require. (Affidavit of Jeffrey Barist filed herein on April 16, 1976).

Defendants further complaint that they are now burdened with having to go to Canada to inspect the books and records is without merit. Defendants made no request

to the court below that the books and records be kept in New York and the court ordered no such restriction. Prior to the issuance of the preliminary injunction, the books and records were in the possession of the defendants and Clarkson was put to the considerable inconvenience and expense of keeping personnel in New York City. The court below stated: "We will just turn the situation around." (A. 420) By "turn[ing] the situation around" the books and records are in Clarkson's possession and it is the defendants who will have to travel to Canada to inspect the books and records. It is entirely proper that given the choice between inconveniencing the trustee who has rightful possession to the books and records, or inconveniencing the defendants with no claim of right to the books and records, it be the defendants who are subjected to the inconvenience.

CONCLUSION

The court below properly exercised its discretion in granting the preliminary injunction and its order should be affirmed with costs.

Dated: New York, New York
June 14, 1976

Respectfully submitted,

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